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No. 87-1807

In the Supreme Court of the United States

OCTOBER TERM, 1987

JULIO DIAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General
J. DOUGLAS WILSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

8 pp

QUESTION PRESENTED

Whether, after the court of appeals vacated one of petitioner's four convictions, petitioner could be resentenced on the remaining convictions to an aggregate prison term equal to the term that he originally received.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 834 F.2d 287. Earlier opinions of the court of appeals are reported at 797 F.2d 99 and 778 F.2d 86.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1987. A petition for rehearing was denied on February 29, 1988.* The petition for a writ of certiorari was filed on May 3, 1988, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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* Petitioner incorrectly states (Pet. 2) that the petition for rehearing was denied on March 8, 1988. See Pet. App. 8a.

STATEMENT

1. a. In April 1985, after a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. 846 (Count 1); possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841 (Count 4); use of a firearm during a crime of violence, in violation of 18 U.S.C. (Supp. II) 924(c) (Count 5); and receiving a firearm after being convicted of a felony, in violation of 18 U.S.C. 922(h) (Count 6). Petitioner was sentenced to concurrent four-year terms of imprisonment on Counts 1, 4, and 6, and a mandatory five-year term on Count 5, to be served consecutively to the other counts. Petitioner thus received a total of nine years' imprisonment. He also received a three-year special parole term. Pet. App. 2a-3a.

b. The court of appeals thereafter affirmed petitioner's convictions on Counts 1, 4, and 6, but it vacated petitioner's conviction on Count 5 (Pet. App. 3a; 778 F.2d 86 (1985)). The court held that narcotics offenses are not "crimes of violence" within the meaning of 18 U.S.C. (Supp. II) 924(c). Accordingly, the court ruled that petitioner could not be convicted under Section 924(c) for carrying a firearm during a narcotics offense (778 F.2d at 88). Recognizing, however, that the district court had originally sentenced petitioner to a total term of imprisonment of nine years and that the reversal on Count 5 would reduce petitioner's term of imprisonment to four years, the court "remand[ed] for resentencing so that the district court [would] have the latitude to increase the sentences on Counts One, Four and Six if it conclude[d] that such increases [were] appropriate" (778 F.2d at 88-89).

c. On remand, the district court imposed concurrent nine-year sentences on each of the three remaining counts, to be followed by a three-year special parole term (Pet. App. 3a-4a). The court of appeals again remanded (*id.* at 4a; 797 F.2d 99 (1986)). It noted that, prior to the resentencing, the trial court had communicated with a United States Senator and the United States Attorney for the Southern District of New York concerning the court of appeals' reversal of petitioner's conviction under Section 924(c) (797 F.2d at 99-100). In those communications, the trial judge had stated that Section 924(c) should be amended to include narcotics offenses as "crimes of violence" (797 F.2d at 100). Finding that "'the appearance of justice' [was] not satisfied" (*ibid.*), the court remanded with instructions that petitioner be resentenced by another judge.

d. A different judge resentenced petitioner. That judge again sentenced petitioner to a total of nine years' imprisonment, this time by imposing three consecutive three-year sentences. Petitioner also received a three-year special parole term. Pet. App. 4a.

2. The court of appeals affirmed (Pet. App. 1a-7a). The court rejected the contention that the district court lacked statutory authority to increase in any way the sentence that had initially been imposed on any count. The court of appeals noted that when it had initially remanded the case it had "expressly [given] the district court 'latitude to increase the sentences' on the remaining valid counts" (*id.* at 4a (citation omitted)). The court also held (*id.* at 7a) that the decision to resentence petitioner on the remaining counts was consistent with this Court's decision in *United States* v. *DiFrancesco*, 449 U.S. 117 (1980).

ARGUMENT

Petitioner contends (Pet. 4-8) that, after the court of appeals reversed his conviction under 18 U.S.C. (Supp. II) 924(c), the district court was prohibited from increasing his sentence on the remaining counts without specific statutory authority. In fact, petitioner's total sentence was not increased. At each stage of the proceedings, petitioner was sentenced to an aggregate of nine years' imprisonment. Nor was his sentence increased on any count, since petitioner originally received four years' imprisonment on each of Counts 1, 4, and 6, and was ultimately sentenced to three years on each of those counts. The difference between the initial sentence and the sentence ultimately imposed on remand was simply that the district court made the sentences on Counts 1, 4, and 6, consecutive rather than concurrent.

The district court had complete authority to resentence petitioner in that manner. When it remanded the case after reversing the Section 924(c) conviction, the court of appeals expressly granted the district court the "latitude to increase the sentences on Counts One, Four, and Six if it conclude[d] that such increases [were] appropriate" (Pet. App. 3a). Under 28 U.S.C. 2106, a court of appeals may remand a case to a district court and "require such further proceedings to be had as may be just under the circumstances." Petitioner does not explain (see Pet. 5) why the broad language of Section 2106 is "too general" to confer the requisite statutory authority for the resentencing in this case. The courts have routinely upheld the authority of district courts to resentence a defendant after a court of appeals has vacated one of several convictions, and to do so in a way that increases the sentences on the remaining counts, as long as the new sentence, in the aggregate, does not exceed the total sentence that was originally imposed.

See, *e.g.*, *United States* v. *Shue*, 825 F.2d 1111, 1113 (7th Cir. 1987), cert. denied, No. 87-5389 (Nov. 16, 1987); *United States* v. *Andersson*, 813 F.2d 1450, 1461-1462 (9th Cir. 1987); *United States* v. *Bello*, 767 F.2d 1065, 1069-1070 (4th Cir. 1985); *McClain* v. *United States*, 676 F.2d 915, 918 (2d Cir.), cert. denied, 459 U.S. 879 (1982). See also *Pennsylvania* v. *Goldhammer*, 474 U.S. 28 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General

J. DOUGLAS WILSON
Attorney

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